No. 3382

United States

Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN IDAHO AND MONTANA POWER COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. L. JORDAN LUMBER COMPANY, a Corporation,

Defendant in Error.

PETITION FOR REHEARING.

Upon Writ of Error to the United States District Court of the District of Montana.

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Defendant in Error.

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To the Above-named Court and Hon. WILLIAM B. GILBERT, Hon. ERSKINE M. ROSS and Hon. WILLIAM H. HUNT, Judges Thereof:

Comes now the above-named plaintiff in error and petitions the Court to vacate the decision rendered on the 2d day of February, 1920, and to grant a rehearing herein; and in that behalf respectfully represents:

That under the undisputed facts upon the merits of the cause as disclosed by the record, great injustice will be done to your petitioner and it will be subject to a liability not warranted by the facts or the merits of the case unless a rehearing is granted herein and your petitioner is afforded an opportunity to urge the grounds for reversal hereinafter set forth, which grounds of error we submit are controlling as to the question of the jurisdiction of the trial Court to render the judgment herein complained of.

The grounds upon which your petitioner asks a rehearing herein are as follows:

First—The complaint upon which the judgment herein was rendered does not state facts sufficient to constitute a cause of action; is insufficient to sustain such judgment; and is fatally defective in the particulars hereinafter set forth.

Second—The trial Court had no jurisdiction to render the judgment herein complained of by reason of the fact that the complaint in this cause was and is fatally defective in the particulars hereinafter set forth.

Third—That the questions now to be presented and to be urged on rehearing have been settled favorably to the contentions of your petitioner by controlling decisions of the Federal and State courts of last resort.

THE COMPLAINT (R., pp. 2, 3, 4, 12, 13, 14).

We invite the attention of the Court to a consideration of paragraphs 3, 4 and 5 of the complaint, found on pages 2, 3 and 4 of the record and to the amendments to paragraph 3, found on pages 12, 13 and 14 of the record. These amendments by stipulation were treated as having been incorporated in the complaint, and relate to paragraph 3 and are designated as paragraph "3a." These amendments describe in some detail the character of plaintiff's business and the buildings used therein and are important only as they make clear the meaning of the term "premises" as used in paragraph 5 of the complaint.

Our contention is that the complaint is fatally defective in that

1st: It fails to charge that any duty was imposed on the Power Company by contract or by reason of any law of the State of Montana.

2d: That there is no relation between the duty charged in the complaint and the breach charged therein.

3d: That there is no allegation setting forth in ordinary or concise language the facts constituting negligence on the part of the Power Company.

4th: That there is no allegation setting forth the charge that the Power Company had knowledge of the alleged defective condition of its appliances and equipment.

5th: That there is no allegation or statement of fact to the effect that the alleged defective condition had existed for a period long enough to charge the Power Company with presumptive or actual knowledge thereof.

6th: That while the complaint alleges in general terms the duty of the Power Company to have and maintain a safe plant, etc., it wholly fails to charge that there was any duty on its part to wire, repair, install or inspect the electrical apparatus upon plaintiff's premises.

7th. That while the complaint charges that it was the duty of the Power Company to maintain safe plant, machinery, etc., "for the proper and safe generation, transmission and distribution of electricity and to inspect and examine the same," there is no allegation that it was negligent in this respect.

8th: That while the complaint charges that the Power Company "carelessly, negligently and unskill-

fully wired said premises'' (meaning, of necessity, the Mill Company's premises), it wholly fails to charge any duty in that respect.

9th: That the complaint wholly fails to allege or charge how or in what manner any of the apparatus or fixtures mentioned therein became worn, damaged or defective or that the Power Company had knowledge or means of knowledge of such defects at any time prior to the fire.

10th: The complaint shows on *on* its face that at all the times mentioned in the complaint the Mill Company was the owner of and had possession and control of the premises and was in the occupancy thereof carrying on and conducting a business as shown in the amendments on pages 12, 13 and 14 of the record, and had presumptive knowledge of the condition of all equipment and machinery therein and said complaint shows upon its face that the fire, if electrical, was caused by reason of the negligence of the Mill Company and said complaint on its face negatives any liability on the part of the Power Company. The complaint wholly fails to show or set forth any causal connection between any act on the part of the Power Company and the fire in question, and wholly fails to set forth or charge in any manner any neglect of duty on the part of the Power Company or any negligent act or omission on its part.

11th: The allegation as to negligence consists of a series of legal conclusions and no facts are set forth.

Paragraph 3 of the complaint charges: That the Power Company was and now is ''engaged in the business of generating, producing and distributing

electricity and selling and applying the same for lighting power and other purposes to the general public for profit and said company at all times hereinafter mentioned, owned, controlled and maintained in the county of Flathead, Montana, an electric plant for generating and distributing electricity to its patrons, customers and others with whom it had contractual relations."

There is nothing in this paragraph which charges any duty on the part of the Power Company. It merely describes the company as a public service company, furnishing power to persons with whom "it had contractual relations."

Paragraph "3a" as found on pages 12 and 13 declares that on the 25th of December, 1916, the plaintiff owned and operated a planing-mill at Columbia Falls with which it manufactured certain lumber products, and that it had on hand a stock of lumber, tools, machinery, equipment, etc.

Paragraph 4 charges that on the 25th day of December, 1916, for a valuable consideration the Power Company was supplying the plaintiff at its mill electricity for lighting and power purposes, and then charges in general terms the ordinary duties of a power company without any relation to any special contract as to wiring premises or special service of any kind.

Paragraph 5 charges that the Power Company did not discharge its duty as set forth in paragraph 4. This part of the allegation of paragraph 5 is without effect, of course, under the authorities hereinafter cited, in view of the fact that it is a general allega-

tion controlled and qualified by the specific allegation immediately following to the effect that the Power Company "carelessly, negligently and unskillfully wired said premises" (meaning, as before suggested, the premises of the Mill Company).

As before suggested, there is no allegation of duty to wire the premises nor is there any allegation of any contract under which it can be said the Power Company undertook to maintain any supervision or inspection of the wiring within the premises. (Minneapolis Gen. El. Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A., N. S., 816.)

This paragraph also alleges that the Power Company carelessly and negligently permitted the said electrical apparatus and fixtures to become worn, damaged and defective (meaning, of course, the apparatus and fixtures within the mill building). This is followed by a general allegation that "by reason of said carelessness and negligence, such great voltage or load of electricity was carried to and upon the wires upon and within the premises of the plaintiff."

This allegation, if it means anything at all, is an attempt to allege that by reason of the fixtures within the mill having become worn and defective, the mill caught fire, and of course, in the absence of an allegation setting forth the duty of the Power Company to install such fixtures and to maintain and inspect them, no actionable negligence is alleged. (Minneapolis General El. Co. v. Cronon, 92 C. C. A. 345, *supra.*)

Not only is the complaint silent as to the existence of any special contract concerning the wiring, but is silent as to when the Power Company did the wiring. In neither respect is the complaint aided by the evidence in the case. The record shows (p. 27) that the Power Company installed the equipment in 1910 or 1911 (five to fourteen years prior to the fire); that since that time the premises have been in the possession and under the control of the Mill Company, not only that, but the record further shows on said page, that the motors had been moved around from place to place since the Power Company first installed the wiring by the Mill Company and its employees and that for three years preceding the trial of the case, the Mill Company had its own electrician.

The record further shows on same page that the original wires introduced into the plant by the Power Company had been taken out and the Mill Company had its own man, Mr. Styles, install another system. The record shows on the same page that motors and lamps were bought from the Power Company but that other material was bought from Marshall-Wells at Spokane and others. We cite the record first for the purpose of showing that, according to the complaint, the negligence charged therein was not the proximate cause of the fire for the reason that the installation, charged as the proximate cause of the fire, was removed long before the fire occurred, and in lieu thereof, there was substituted other equipment by and under the direction of the Mill Company, with which the Power Company had nothing whatever to do, and, second, for the purpose of show-

ing that this does not present a case where the complaint is aided by the record in any way nor one where substantial justice calls for the application of any of those rules under which complaints have been sustained, although defective, when attacked for the first time on appeal.

In this state of the record the language of the Circuit Court of Appeals, Eighth Circuit, in the case of Minneapolis Gen. El. Co. v. Cronon, *supra,* is pertinent. In that case the *Power Company had wired the building in question some three years prior to the accident.* Discussing the plaintiff's contention that it was the duty of the Power Company to inspect the Court says:

> "No considerate authority supports this proposition. Its recognition and enforcement by the Courts would impose upon the company furnishing electricity under contract with the owner of a building, who had wired it and owned and controlled the wires inside, an intolerable burden. Take such a city as Minneapolis, with perhaps 20,000 dwelling and business houses wired inside, under an independent contract. The contract of the electrical company is to furnish the required amount of electricity to light these buildings. Can the company, unbidden, enter at will the private house of the citizen and pass into its various rooms to inspect these wires every day to see that they are in proper condition for the reception of the electricity it has contracted to sell? If so, it must employ a large retinue of competent men to do this work; and,

> as absolute insurers under the rule contended for, the necessities of the situation would demand that they should have free access to these buildings at all hours and under all conditions. Such a rule of law would tend to put concerns furnishing electricity to private houses out of business."

Not only does the complaint fail to set out a contract obligating the Power Company to wire the "premises" or to inspect or maintain such wiring after its installation, but the record shows conclusively that it was impossible for such contract to have existed between plaintiff in error and defendant in error for the reason that the A. L. Jordan Lumber Company did not own the property at the time the wiring was installed by the Power Company, and the A. L. Jordan Company as a corporation did not exist at that time.

> "The A. L. Jordan Company began to do business in 1912. Prior to that time the business was transacted in the name of Jordan & Jessup, a copartnership. My interest in that concern was one-half interest. The Power Company installed the electrical equipment outside of the motors in that mill in 1910 or 1911. I couldn't say when the lighting system was installed. It was done after the mill was in. Since 1910 the motors have been moved around from place to place in that plant, and for the past three years I have had my own electrician or a man to do this electrical work. The motors were moved around by myself and my employees." (R., p. 27.)

On page 20, Mr. Jordan testified that the A. L. Jordan Lumber Company owned the property for about five years before it was burned down. This would exclude the years 1910 and 1911, the period during which the Power Company is supposed to have wired the premises.

If a special contract was entered in to wire these premises or to maintain and inspect them, can the Court say, from an examination of this complaint, what the terms of the contract were; what conditions or obligations were imposed on the Mill Company; how long the contract was to continue or what right the Power Company had to enter upon the premises for the purpose of making examination, inspection or repairs; or what consideration was to be paid for the services?

On the other hand, if the Mill Company is seeking to charge the Power Company as a public service corporation under its general liability regardless of special contract, can the Court say what is referred to by the words, "carelessly and negligently permitted the *said* electrical apparatus and fixtures to become worn, damaged and defective," when no apparatus or fixtures other than those coming under the terms "wired said premises, and carelessly, negligently and unskillfully installed said electrical apparatus and appurtenances" are mentioned in paragraph 5 of the complaint? And by the same token, can the Court say what is meant by the terms "carelessly and negligently failed to keep and maintain *the same* in good repair," if the same does not refer to the apparatus and fixtures mentioned in said section 5? This para-

graph of the complaint is not aided by paragraph 4, for the reason that paragraph 4 is self-contained and merely sets forth the general duty of a Power Company.

In the present state of the record it is apparent that the contract, if contract there were, was made with some person not a party to the suit, and if made with the predecessor of the Mill Company, there is no showing that the same was assigned to the defendant in error, if indeed such a contract under any circumstances would be assignable.

The following authorities hold that a Power Company is not liable for injuries caused by defective interior wiring where there is no special contract to maintain or inspect:

> Herzog v. Municipal Elec. Light Co., 89 App. Div. 369, 85 N. Y. Supp. 712 (affirmed without opinion in 180 N. Y. 518, 72 N. E. 1142); National F. Ins. Co. v. Denver Consol. Elec. Co., 16 Col. App. 86, 63 Pac. 449; Harter v. Colfax Elec. Light & P., 124 Iowa, 500, 100 N. W. 508; Memphis Consol. Gas & Elec. Co. v. Speers, 113 Tenn. 83, 81 S. W. 595; Brunelle v. Lowell Elec. Light Corporation, 188 Mass. 493, 74 N. E. 676.

Permit us also to suggest that while paragraph 4 of the complaint (charging the Power Company with the general duty to have and maintain a safe plant, machinery, etc.), also charges a duty on the part of the Power Company to inspect the same at reasonable times, there is no charge in paragraph 5 (relating to the supposed special duty to the Mill Com-

pany), either as to the duty to inspect or the failure to do so; and permit us also in this connection to suggest that this failure to allege is not aided by either the evidence or the decision, for the reason that there was no proof whatever of any contract, special or otherwise, to wire the buildings or to maintain or inspect the instrumentalities within the buildings, and the decision of the trial Court is to like effect. (R. 147.)

RULES OF PLEADING AS ESTABLISHED IN MONTANA.

Section 6532 of the Code of Civil Procedure of the State of Montana provides:

> "The complaint must contain:
>
> " * * 2. A statement of the facts constituting the *a* cause of action, in ordinary and concise language."

Section 6539 provides that an objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action are not waived by failure to demur. In this case we take it that the doctrine of *res ipsa loquitur* has no application and that only ordinary care is exacted of a Power Company furnishing electrical power to its customers, taking into consideration the dangerous character of electricity. In other words, we take it that it will not be held that a Power Company, under the circumstances set forth in the complaint, will be deemed an insurer.

The Supreme Court of Montana has repeatedly stated the rules of pleading applicable to cases of this character.

In the case of Chealey v. Purdy, 54 Mont. 789, 171 Pac. 926, that Court says:

> "Whatever may be the nature of the cause of action upon which a plaintiff asks to recover, he must allege in his complaint the presence of all of the elements necessary to make it out."

In the case of Ellinghouse v. Ajax Livestock Co., 50 Mont. 275, 152 Pac. 481, the Supreme Court of Montana says:

> "It is well settled by the decisions of the Court that the sufficiency of a complaint may be questioned for the first time on appeal, and that, if found fatally defective, a judgment rendered thereon for the plaintiff will be reversed. (Foster v. Wilson, 5 Mont. 53, 2 Pac. 310; Tracy v. Harmon, 17 Mont. 465, 43 Pac. 500; Shober v. Blackford, 46 Mont. 194, 127 Pac. 329; Coole v. Helena, L. & Ry. Co., 49 Mont. 443, 143 Pac. 974.)

These cases merely give force to the rule declared by the statute (Rev. Codes, sec. 6539), that a failure to question the sufficiency of a complaint by demurrer in the trial Court does not amount to a waiver of the right to question it thereafter.

At page 283 in the same opinion the Court says:

> "It is elementary, when a plaintiff asks recovery for actionable negligence, his complaint must allege facts showing these three elements;
>
> (1) That the defendant was under a legal duty to protect him from the injury of which he complains;

(2) That the defendant failed to perform this duty; and

(3) That the injury was proximately caused by defendant's delinquency. All of these elements combined constitute the cause of action; and if the complaint fails to disclose, directly or by fair inference from the facts alleged, the presence of all of them, it is insufficient, for it fails to state the facts constituting a cause of action."

See, also,

Glover v. Chicago, etc. Ry. Co., 54 Mont. 446.

In the latter case the Court also says:

"But if the happening of the accident is not necessarily inconsistent with ordinary care, *res ipsa loquitur* cannot apply."

See, also,

Fusselman v. Yellowstone V. L. & I. Co., 53 Mont. 256, 163 Pac. 473; Chenowith v. G. N. Ry. Co., 50 Mont. 481; Waite v. C. E. Shoemaker & Co., 50 Mont. 264; McIntire v. N. P. Ry. Co., —— Mont. ——, 180 Pac. 971; Kelley v. John R. Daily Co., —— Mont. ——, 181 Pac. 326.

We invite the particular attention of the Court to the opinion in the case of Pullen v. City of Butte, 38 Mont. 194, 99 Pac. 290.

In that case the plaintiff alleged:

"That the defendant * * * willfully, negligently, carelessly and wrongfully *caused* the public sidewalk on the west side of Idaho

> Street between Galena and Mercury streets, * * * to be placed in, and willfully, carelessly, wrongfully, knowingly and negligently permitted the same to remain in, an unsafe, dangerous, and defective condition."

The Court, after quoting section 6532 of our Revised Code, requiring a statement of the facts constituting a cause of action in ordinary and concise language says:

> "It is true, in some jurisdictions, it seems to be held sufficient to allege generally that the injury complained of was carelessly and negligently inflicted upon the plaintiff, or that, by reason of the carelessness and negligence of the defendant, the plaintiff was injured; but this mode of statement has never been sanctioned or approved in this state, it is at variance with the plain requirements of the Code, and would give the defendant no notice of the acts claimed to be negligence so that he might come prepared to meet them."

In the case of Philips v. Butte etc. Fair Association, 46 Mont. 338, 127 Pac. 1011, the plaintiff was injured by reason of a defective stairway in a grand stand. It was alleged that the defendant negligently permitted the defects to remain *"for a considerable period of time"* before the day of the injury *"and at the time of said injury, and long prior thereto, defendant knew of the defective condition of the said stairs."* The Supreme Court held that this allegation was not sufficient that the complaint did not state

a cause of action, and discusses the measure of duty which the proprieter of such a place owes to a patron who comes thereto at his invitation and pays for the privilege, and holds that such proprietor is not an insurer of the safety of his patrons, but that he is held to ordinary care only, and holds that *under the rule of ordinary care that the allegation as to knowledge of the defects was not sufficient and that the complaint did not state a cause of action.*

In the case of McEnaney v. City of Butte, 43 Mont. 526, 117 Pac. 893, the plaintiff slipped on an icy sidewalk. The plaintiff alleged "that at and during all the times herein mentioned, the defendant had full knowledge of all the facts and matters herein alleged."

Referring to the question of knowledge on the part of the city as to the defective condition of the sidewalk, the Court say:

> "Was this period of time an hour, or a day or a month? The allegation is but a conclusion which the pleader has left unaided by the statement of any specific fact to enable one to determine what the length of time was. Hence the complaint does not contain a statement of facts in ordinary and concise language (Rev. Codes, para. 6532), and is insufficient to sustain a judgment."

The following rule was laid down by the United States Supreme Court in

> Minor v. Mechanics' Bank, 1 Pet. 46, and reaffirmed in

Garrett v. Louisville & N. R. Co., 235 U. S. 108, 35 Sup. Ct. Rep. 32, 59 L. Ed. 242:

"Where any fact is necessary to be proved, in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence and not be taken by surprise, and the Jury may not be misled by the introduction of various matters."

See, also,

Alabama v. Burr, 115 U. S. 415.

QUESTION MAY BE RAISED FOR FIRST TIME ON APPEAL.

The following decisions by the Supreme Court of the United States hold that the question of the sufficiency of the complaint may be raised for the first time in the Appellate Court:

Slacum v. Pomeroy, 6 Cranch, 221; Bennett v. Butterworth, 11 How. 676; Suydam v. Williamson, 20 How. 433; Pomeroy v. Indiana St. Bank, 1 Wall. 600; Rogers v. Burlington, 3 Wall. 661; Thompson v. Central Ohio R. Co., 6 Wall. 137; Kentucky L. etc. Ins. Co. v. Hamilton, 63 Fed. Rep. 93; McAllister v. Kuhn, 96 U. S. 87, 24 L. ed. 615; Cragin v. Lovell, 109 U. S. 194, 27 L. ed. 903; Coffey v. U. S., 116 U. S. 436, 29 L. ed. 684; Garland v. Davis, 4 How. 131, 11 L. ed. 907.

In the case of Slacum v. Pomeroy, *supra,* and Garrett v. Davis, *supra,* the Supreme Court reversed the respective judgments altho the objection was in neither case raised below, and in the latter case was not raised by counsel for plaintiff in error. (Note 58, sec. 711, page 2550, 3 Foster's Federal Practice.)

The following decisions by the Supreme Court of Montana hold that on appeal from a judgment the question of the sufficiency of the complaint may be raised for the first time in the Supreme Court:

> Largey v. Sedman, 3 Mont. 272; Foster v. Williams, 5 Mont. 53, 2 Pac. 310; Parker v. Bond, 5 Mont. 1, 1 Pac. 209; Vance v. McGinley, 39 Mont. 46, 101 Pac. 247; Glendenning v. Slaten, 55 Mont. 586, 179 Pac. 817 (decided April 14, 1919.).

ELECTRIC COMPANY NOT AN INSURER.

To the same effect is the decision of this court in Puget Sound Navigation Co. v. Lavender, 84 C. C. A. 259.

Referring again to the case of Phillips v. Butte Fair Association, 46 Mont. 238, the distinction is made in a general way between one who is charged as an insurer and one who is charged with the exercise of ordinary care.

We submit that under the weight of authority, both state and federal, electric companies may not be charged as insurers and that they are held to the exercise of ordinary care,—this care, of course, to be measured by the character of electricity as a dangerous agency.

(To be inserted at page 19 following the citation of Bourke v. Butte, etc, Power Company)

City Light & Water Co v. James
261 Fed 596 (Nov 12, 1919).

his case distinguishes the case of San Juan Light Company v- Requena, 224 U. S. 89. The Requena case is distinguished from the case at bar at page 32 of our brief in chief.

See Curtis Law of Electricity, section 400, page 583, and section 405, page 595, and authorities cited.

This general rule has been adopted by the Supreme Court of Montana.

Bourke v. Butte etc. Power Co., 33 Mont. 267.

THE GENERAL CHARGE OF NEGLIGENCE IS CONTROLLED BY THE SPECIFIC CHARGE IN THE COMPLAINT.

We have heretofore suggested that the general allegation contained in paragraph 5 of the complaint, that the Power Company did not discharge its duty as set forth in paragraph 4, is not entitled to be considered, for the reason that this general allegation is controlled and qualified by the specific allegation immediately following, to the effect that the Power Company *"carelessly, negligently and unskillfully wired said premises."* The authorities on this question are collated in the note to Walter v. Seattle, Renton & Southern Ry. Co., 48 Wash. 233, 93 Pac. 419, as reported in 24 L. R. A. (N. S.) at page 788.

The Supreme Court of the State of Montana in the case of Pierce v. G. F. & C. Ry. Co., holds that where even a passenger sets out the specific act of negligence, a recovery cannot be had on a general allegation, nor upon the doctrine of *res ipsa loquitur,* which in Montana concededly applies in the case of a passenger where the passenger relies upon the doctrine and does not attempt to set out the specific negligence upon which he seeks to charge the carrier. In cases of the kind at bar the doctrine of *res ipsa loquitur*

does not apply in any event, and the bare fact that an injury has occurred affords no ground for inferring negligence.

> Lyons v. Chicago, M. & St. P. Ry. Co., 50 Mont. 532, 148 Pac. 386; Nelson v. N. P. Ry. Co., 50 Mont. 516, 148 Pac. 388; Howard v. Flathead Ind. Tel. Co., 49 Mont. 197, 141 Pac. 153.

If we were to apply the doctrine of *res ipsa loquitur* in this case much would depend, as the Supreme Court of the United States said, in a recent case, upon the *"res."* In this case the complaint charges that the Mill Company was the owner of, using, operating and controlling the premises, and, if an electrical fire occurred within the premises, the presumption, if any, would be that it was caused by the negligence of the company which had the electrical instrumentalities and equipment under its control, which, as before suggested, would be in this case the Mill Company. (Minneapolis Gen. El. Co. v. Cronon, 92 C. C. A. 345.

THE COMPLAINT SHOWS CONTRIBUTORY NEGLIGENCE ON THE PART OF THE MILL COMPANY.

The Mill Company was the owner of, in possession and control of the premises which it says the Power Company negligently wired. This charges the Mill Company with knowledge of the condition of the equipment which it was using, as it says it was in the manufacture of lumber products.

In Montana, contributory negligence is ordinarily a matter of defense, but if the complaint shows con-

tributory negligence, then it is incumbent upon the plaintiff to allege facts sufficient to exonerate it from the charge.

Lynes v. Northern Pacific Ry. Co., 43 Mont. 317, Ann. Cas. 1912C, 183, 117 Pac. 81; Poor v. Madison River Power Co., 38 Mont. 341, 99 Pac. 847; Montague v. Hansen, 38 Mont. 376, 99 Pac. 1063; Michalsky v. Centennial Brewing Co., 48 Mont. 1, 134 Pac. 307.

THE RECORD.

We take it that a petition for rehearing is addressed to the discretion of the Court, and in order that this discretion may be properly exercised, we deem it proper to refer to the record in this case, not for the purpose of restating or rearguing any legal propositions heretofore submitted, but in order that the effect of a rehearing and a reversal thereon may be determined on the principles laid down in the case of

Garland v. Davis, 4 How. 131, 11 L. ed. 907, *supra.*

Many of the courts have laid down the rule that where the merits of the case justify such course, the complaint will be deemed amended to conform to the evidence when the question of the sufficiency of the complaint is raised for the first time on appeal. Other courts have adopted the rule that in such circumstances, the case will be remanded with instructions directing that the pleading be amended to conform to the proof, and some Courts have been disposed to disregard the objection when made for the

first time on appeal. But as will be noted, by reference to the foregoing authorities, this rule has never been adopted by the Supreme Court of Montana or by the Federal courts of last resort.

The question then is, Are we too late in urging these objections to the complaint? Our contention in this respect is that the question is jurisdictional and therefore may be urged at any time. Secondly, that it is contrary to the policy of the Courts generally to permit a judgment to rest upon a complaint which does not state a cause of action, and, third, that in this case none of the reasons for disregarding the error, or correcting it, which the Courts have given for rulings along that line, are present.

It would be hard, indeed—nay—it would be impossible to amend this complaint to conform to the proof and still leave the record in such shape that a judgment for plaintiff would be warranted. Not only the complaint, but the evidence wholly fails to establish a cause of action against the plaintiff in error, and, if the judgment is permitted to stand, a great hardship will be worked upon the plaintiff in error by reason of its failure to move the lower Court to render judgment in its favor.

We urge that we are justified in asking that the judgment be reversed on the grounds herein suggested, for the reason that thereby substantial justice may be done the parties, and we believe that, under the decision in the Garland-Davis case, we are warranted in presenting this petition. In that case, Mr. Justice Woodbury in his opinion says:

"In the examination of this case, a defect has been discovered in the pleadings and verdict, which was not noticed in the court below, *nor suggested by the counsel here* (italics ours).

And the first question is, whether, under the circumstances, it can be considered by us; and if it can be, and is a material defect, not cured or otherwise capable of being overcome, whether it ought to be made a ground for reversal of judgment, and sending the case back for amendment and further proceedings.

There can be no doubt that exceptions to the opinions given by the Court below must all be taken at the time the opinions are pronounced.

But it is equally clear that when the whole record is before the Court above, as in this case, any exception appearing on it can be taken by counsel which could have been taken below. (Roach v. Hulings, 16 Peters, 319)."

So it is the duty of the Court to give judgment on the whole record *and not merely on the points stated by counsel* (italics ours). (Slacum v. Pomeroy, 6 Cranch, 221; Baird & Co. v. Mattox, 1 Call, 257, 16 Pet. 319.)

In United States v. Bernum (1 Mason, 62) the Court took notice of the defect, which was the sole ground of its opinion. In Patterson v. United States (2 Wheaton, 222) it is stated that "The points made were not considered by the Court, and judgment was pronounced on other grounds," and Justice Washington says (page 24):

> "The Court considered it to be unnecessary to decide the questions which were argued at the bar, as the verdict is so defective that no judgment can be rendered upon it and on that account the proceedings below were reversed. (See, also, Harrinson et al., v. Nixon (Pet. 483, 535."

Again, in the same case, Mr. Justice Woodbury says:

> "Considering the character and position of this tribunal, as one of the last resort in administering justice, and considering the increased disposition of the age in which we live to eviscerate the truth, and decide ultimately only on the real merits in controversy between parties, or in the words of Justice Story (1 Story, 152, in Bottomly v. The United States), as to 'technical niceties,' considering 'the days for such subtilties in a great measure passed away,' it seems a duty of our own motion to give all reasonable facility to get the record in an intelligible and proper shape before we render final judgment."

Whether the result of a rehearing be a reversal of the judgment with instructions to enter judgment in favor of the plaintiff in error or whether it be that the cause be remanded with instructions to permit the complaint to be amended and a new trial granted, it seems to us that such rehearing ought to be granted and the plaintiff in error given an opportunity to urge the objections herein set out in order that it may have the benefit of the principles laid down in the Garland-Davis case, and in order that a judg-

ment not justified by the pleadings or the evidence may be set aside.

No better illustration of the effect of defective pleadings as observed by the Supreme Court of the United States in the cases of Minor v. Mechanics' Bank and Garret v. Louisville, *supra,* can be found than in the case at bar.

The Court below found that the fire was caused by reason of a defective lightning-arrester, located several hundred feet from the premises. The complaint contained no allegation remotely referring to lightning-arresters, altho it mentioned other electrical apparatus, and it charged only negligence in installing electrical "fixtures" and apparatus on plaintiff's premises.

Our main contention, however, is that under no view of the evidence or the complaint was plaintiff entitled to recover, and that this defect appearing of record, it ought now to be corrected to the end that substantial justice may be done.

Respectfully submitted,

B. S. GROSSCUP and
SIDNEY M. LOGAN,

Attorneys for Petitioner and Plaintiff in Error.

State of Montana,
County of Flathead,—ss.

I, Sidney M. Logan, do hereby certify: That I am one of the attorneys for plaintiff in error and petitioner herein; that in my judgment the foregoing petition is well founded; and that it is not interposed for delay.

SIDNEY M. LOGAN,

Of Counsel for Plaintiff in Error and Petitioner.